STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 25, 2008
v	No. 275687 Wayne Circuit Court
ANTHONY DESHAWN DOZIER, Defendant-Appellant.	LC No. 06-007700-01

Before: Meter, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of armed robbery, MCL 750.529. Defendant was sentenced to 15 to 30 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court denied him due process when it failed to order the prosecution to specifically perform the plea agreement it entered into with defendant. We disagree.

After defendant's arrest for armed robbery in June 2006, he informed the police that he only agreed to participate in the robbery after being threatened by his friend, Roosevelt Daughrity. Defendant and the prosecution entered a plea agreement on October 13, 2006, in which the prosecution agreed to recommend a sentence "below the guidelines" in exchange for defendant's cooperation with the investigation of Daughrity. While the agreement did not indicate what the guidelines range was, defendant alleges that the range calculated by the prosecution was 53 to 180 months. When defendant appeared for sentencing on October 31, 2006, he informed the court that the guidelines had been re-calculated and now presented a range of 108 to 180 months. Defendant asked the trial court to honor the prosecution's original indication that it would sentence him to approximately five years in prison. When the trial court refused, it agreed to vacate defendant's guilty plea. This was the correct remedy that the trial court should have done. Therefore, there was no error. *People v Nixten*, 183 Mich App 95; 454 NW2d 160 (1990).

Defendant next contends the trial court erred in admitting his July 2006 statement to police despite the fact that the prosecution did not disclose the existence of the statement to defense counsel. We disagree. The propriety of a trial court's admission of evidence is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

Pursuant to MCR 6.201(B)(3), a prosecutor must disclose "any written or recorded statements by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial." As such, the prosecution should have disclosed the existence of defendant's statement to defense counsel. However, this Court has previously explained that, where a prosecutor violates a discovery order by not disclosing a statement made by a defendant, no remedy is warranted because the defendant has knowledge of the statement, and therefore, does not need to rely on the discovery mechanism. *People v Taylor*, 159 Mich App 468, 487-488; 406 NW2d 859 (1987). Therefore, though the prosecutor should have disclosed the statement, because defendant made the statement and knew of the statement's existence, no remedy is needed to correct the error.

Defendant further contends that the statement was inadmissible as it was provided to the police during plea negotiations. We disagree. Because defendant failed to preserve this claim, it is reviewed for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Pursuant to MRE 410(4), "any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn" are inadmissible. The record does not sufficiently support defendant's claim that the statement was made during plea discussions. The statement was made in July 2006, approximately one month after defendant was arrested. Defendant entered his guilty plea in October 2006. Nothing in the record establishes the context in which this statement was provided or when the formal plea negotiations began. Furthermore, there is no allegation that an attorney for the prosecution was present at the discussion. This Court has explained that when a prosecuting attorney is not present at the time incriminating statements are made to the police, MRE 410 is inoperative. *People v Hannold*, 217 Mich App 382, 391; 551 NW2d 710 (1996).

Defendant also alleges the statement was involuntary as it was induced by a promise of leniency. We disagree. Because defendant failed to preserve this claim, it is reviewed for plain error affecting his substantial rights. *Carines*, *supra*. As our Supreme Court has explained, in determining whether a statement was provided voluntarily, and thus, in compliance with our constitutional requirements, this Court should examine the totality of the circumstances. *People v Cipriano*, 431 Mich 315, 319; 429 NW2d 781 (1988). The Supreme Court has stated that the following factors should be considered in ascertaining whether a statement was provided voluntarily:

> the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id*. at 334.]

Where a statement is induced by a promise of leniency, the promise is but one of the circumstances to consider. *People v Givans*, 227 Mich App 113, 119-120; 575 NW2d 84 (1997).

The totality of the circumstances does not establish that the statement was provided involuntarily. Defendant provided an incriminating statement to the police on the day of the alleged crime, more than one month before he provided the statement in question. There is no claim that the first statement was provided in response to any promises. Thus, defendant had already exhibited a willingness to speak to police without being provided any external motivation. When considering that defendant had already admitted his involvement in the robbery, the presence of a promise of leniency likely had little effect on whether he was willing to further expound in the details of the events in question.[1] Furthermore, defendant makes no claim that any of the other factors provided in *Cipriano* weigh in his favor. As such, he has failed to demonstrate that the statement was provided involuntarily.

Next, defendant claims that the statement is inadmissible because it was taken in violation of his Sixth Amendment right to counsel at critical stages of the prosecution. This issue is not properly before this Court as it was not included in defendant's questions presented. MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

Defendant next alleges that he was denied the effective assistance of counsel when his attorney failed to discover his statement to police and was thus unable to present a convincing suppression argument to the trial court. This issue is not properly before this Court as it was not included in defendant's questions presented. MCR 7.212(C)(5); *Brown, supra*.

Next, defendant contends that the court improperly scored the sentencing guidelines. Specifically, defendant alleges that Offense Variable (OV) 4 was improperly scored at ten points when it should have been scored at zero points. At sentencing, in reference to the guidelines, Defense counsel stated, "We refigured them again, the prosecution and I, and they are correct, a hundred and eight to a hundred and eighty months is correct." Defendant thus affirmatively approved of the scoring of OV 4. In doing so, he waived any objection and any error is extinguished. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Finally, defendant asserts that counsel was ineffective for failing to object to the scoring of OV 4. We disagree. In order to prevail on an appeal based on ineffective assistance of counsel, defendant must establish that his attorney's assistance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). There is a strong presumption that defense counsel's actions were sound trial strategy. *Id*. In order to demonstrate prejudice, defendant must establish that there is a reasonable probability that, but for the mistakes of his attorney, the result of the trial would have been different. *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). The United States Supreme Court has further stated that the proper inquiry is whether, as a result of counsel's performance, the outcome of the trial was fundamentally unfair,

[1] This Court notes that the record does not establish that any such promise of leniency had been made to defendant prior to his second statement given to the police.

unreliable or prejudicial. *Lockhart v Fretwell*, 506 US 364, 369; 113 S Ct 838; 122 L Ed 2d 180 (1993). Defendant's claim that he was denied the effective assistance of counsel presents a question of constitutional law that this Court reviews de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

OV 4, as provided in MCL 777.34, states:

> (1) Offense variable 4 is psychological injury to a victim. Score offense variable 4 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Serious psychological injury requiring professional treatment occurred to a victim ……..... 10 points
>
> (b) No serious psychological injury requiring professional treatment occurred to a victim ……..... 0 points
>
> (2) Score 10 points if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.

As indicated in MCL 777.34(2), a victim need not actually be treated for a psychological injury for the trial court to assess points for OV 4. The trial court's assessment of ten points for OV 4 thus reflects its determination that one victim suffered psychological injury during the armed robbery that may require professional treatment. This finding is supported by the record and by case law.

At trial, Diane Clary testified that she was in fear while Daughrity held a knife to her neck during the robbery. Furthermore, according to the Presentence Investigation Report, Clary was emotionally upset after the robbery and requested a leave of absence from her employer. This Court has previously held that the record supports scoring ten points for OV 4 when a witness testifies to being in fear during the event in question. *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). Because the record establishes that Clary was fearful during the encounter and emotionally disturbed following the encounter, OV 4 was properly scored at ten points. As such, any objection to the scoring of OV 4 would have been without merit. Defense counsel has no obligation to make a meritless objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Affirmed.

/s/ Patrick M. Meter
/s/ David H. Sawyer
/s/ Kurtis T. Wilder